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doctrine of fungible goods seems equally applicable to the relations of mortgage and pledge. If a mortgagee wrongfully disposes of chattels before or after tender of the amount due, the mortgagor may recover in conversion.<sup>15</sup>

**MEASURE OF DAMAGES IN CONTRACTUAL ACTIONS.**—In the leading case of *Hadley v. Baxendale*, decided in 1854, the rule was laid down that the damages recoverable in the ordinary action of contract are "such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been within the contemplation of both parties at the time they made the contract as the probable result of the breach of it."<sup>1</sup> Few cases since have failed to apply the test thus formulated. But of a second proposition stated as a corollary in that case there has been no such unanimous approval. That proposition makes the defendant liable for damages naturally resulting from special circumstances where he had notice of such circumstances. High authorities have contended that mere notice to the defendant is not sufficient, that he must in effect agree to be responsible for the consequences of default under the special circumstances.<sup>2</sup> It is conceded, however, that in most cases the mere agreement to perform made by one having notice would be sufficient evidence to warrant a jury in finding that the defendant had in fact assumed the greater degree of liability.<sup>3</sup> The logical consequence of this view is an argument that carriers, who by law are deprived of the option of refusing performance, cannot be held for damages arising under special circumstances, even though they may have notice thereof.<sup>4</sup> The Supreme Court of Massachusetts in February declined to commit itself upon this question, contenting itself with a reference to an earlier opinion<sup>5</sup> in which the point was suggested but not determined. *Weston v. Boston and Maine R. R. Co.*, 34 Bunker and Tradesman 541.

The rule making the fact of notice merely evidence of consent to stand by the consequences rests upon a misconception of the nature of the obligation to pay damages, a misconception somewhat aided by the language quoted above from *Hadley v. Baxendale*. The theory is that the obligation arises from the intention of the parties, and that the test suggested is one which the law adopts as most likely to ascertain and effectuate that intention in the given instance.<sup>6</sup> In fact, liability for damages is imposed by law, and is in no way consensual.<sup>7</sup> How, indeed, could it be when ordinarily

<sup>15</sup> *Eslow v. Mitchell*, 26 Mich. 500; *Pierce v. Hasbrouck*, 49 Ill. 23.

<sup>1</sup> *Per Alderson*, B., in *Hadley v. Baxendale*, 9 Exch. Rep. 341, 354.

<sup>2</sup> *Wilkes*, J., in *Horne v. Midland Railway Co.*, L. R. 7 C. P. 583, 591; *Beal, Bailments*, 663, 664; *Benjamin, Sales*, 6th Am. ed., 880; 2 *Smith Lead. Cas.*, 11th Eng. ed., 541.

<sup>3</sup> *Mayne, Damages*, 7th ed., 42.

<sup>4</sup> *Kelly, C. B.*, in *Horne v. Midland Railway Co.*, L. R. 8 C. P. 131, 136, 137; *Mayne, Damages*, 7th ed., 32, 42; *Carver, Carriage of Goods by Sea*, 4th ed., § 716.

<sup>5</sup> *Lonergan v. Waldo*, 179 Mass. 135, 140.

<sup>6</sup> See *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 544, *per Holmes*, J.; *Lonergan v. Waldo*, *supra*, at 139, 140. Cf. *Industrial Works v. Mitchell*, 114 Mich. 29.

<sup>7</sup> See *Cotton, L. J.*, in *Hydraulic Engineering Co. v. McHaffie*, L. R. 4 Q. B. D. 670, 677; *Pollock, Notes to Indian Contract Act* 260; 1 *Sutherland, Damages*, 3rd ed., 168; and especially an able article on "The Rule in *Hadley v. Baxendale*," by F. E. Smith, 16 *L. Quar. Rev.* 275.

the parties to a contract have in mind its performance, not its breach?<sup>8</sup> When the damages are assessed as those which it is reasonable to suppose that the parties had in mind, what is really meant is that the law, aiming at compensation but proceeding upon principles of justice, considers it fair to hold a defendant for damages which as a reasonable man he ought to have foreseen as likely to follow from a breach.<sup>9</sup> What he in fact foresaw or contemplated is immaterial. Where special circumstances exist, notice is all important in determining whether the consequences were foreseeable to a reasonable man in the defendant's position; but the defendant's consent implied in fact is no more relevant in fixing the extent of his liability than is the existence of a contract implied in fact where recovery is sought upon quasi-contractual grounds. On principle it matters not if notice of the special circumstances which would make a breach especially disastrous comes to the defendant not from the plaintiff but through other channels.<sup>10</sup> The carrier's inability to decline shipments must therefore be considered unimportant in determining his responsibility;<sup>11</sup> and despite the *dicta* of eminent authorities to the contrary, the result of most of the decided cases indicates that this is the law.<sup>12</sup>

THE CONSTITUTIONALITY OF THE FLAG LAWS.—In 1900 a manufacturer who had been adorning his cigar boxes with pictures of the national flag was indicted under an Illinois Act forbidding the use of such advertising methods except in art exhibitions. The court held<sup>1</sup> the statute unconstitutional as depriving the defendant of liberty without due process of law; as denying him equal protection of the laws, since art exhibitions were excepted; and as interfering in a matter which was exclusively the concern of Congress. In 1904 a similar statute was held unconstitutional in New York, the court taking the ground that it infringed existing property rights.<sup>2</sup> The case against the statutes was simple. They not only deprived people of the liberty of advertising in a certain way, but, if the flag advertisements were already in existence, they deprived people of property as well. This would plainly make them bad under the Fourteenth Amendment unless something could be found to take them out of its operation.

In September, 1905, the Massachusetts law forbidding the use of the state arms in advertising was upheld,<sup>3</sup> and a manufacturer was convicted for

<sup>8</sup> Professor Williston in 8 HARV. L. REV. 30; Cotton, L. J., in Macmahon *v.* Field, L. R. 7 Q. B. D. 591, 597.

<sup>9</sup> This test is substantially that adopted in the Code Napoleon, Bk. III, Tit. III, §§ 1149, 1150, 1151, cited by Parke, B., in Hadley *v.* Baxendale, *ubi supra*, 346. Cf. La. Civil Code § 1934, and Pothier, Obligations, 2d Am. ed., 71 *et seq.*

<sup>10</sup> See Kelly, Maus & Co. *v.* La Crosse Carriage Co., 120 Wis. 84. Mr. Smith makes the forcible suggestion that imposing upon the carrier this liability notwithstanding his inability to refuse the contract is simply another illustration of the burdens which he must take along with his lucrative monopoly. 16 L. Quar. Rev. 283. But that the carrier should be allowed to charge higher rates, see 3 Sutherland, Damages, 3rd ed., 2715.

<sup>12</sup> Missouri, etc., Ry. Co. *v.* Belcher, 89 Tex. 428; Deming *v.* R. R., 48 N. H. 455; Railroad *v.* Cabinet Co., 104 Tenn. 568. Notice after performance has begun is too late. Am. Express Co. *v.* Jennings, 38 So. Rep. 374 (Miss.). As to how definite the notice must be see Kelly, Maus & Co. *v.* La Crosse Carriage Co., *ubi supra*.

<sup>1</sup> Ruhstrat *v.* People, 185 Ill. 133.

<sup>2</sup> People *v.* Van de Carr, 178 N. Y. 425.

<sup>3</sup> Commonwealth *v.* Sherman, 75 N. E. Rep. 71 (Mass.).